Supreme Court, U.S.
FILED
SEP 7 1993
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No. 93-161

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1993

AMERICOM DISTRIBUTING CORPORATION,
Petitioner

v.

ACS COMMUNICATIONS, INC.,
Respondent

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENTS FIRST RAISED IN BRIEF IN OPPOSITION

1. Does a disfavored buyer's willingness to resell goods of like kind and quality at a resale price competitive with that charged by his favored competitor who receives the benefit of a discriminatory price preclude the disfavored buyer from obtaining relief under the Robinson-Patman Act?

2. Can the cost justification defense be employed when the purported cost savings are not related directly to the sales which are at issue?

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Petitioner Americom Distributing Corporation respectfully offers this Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

I. A DISFAVORED BUYER'S WILLINGNESS TO RESELL GOODS OF LIKE KIND AND QUALITY AT A RESALE PRICE COMPETITIVE WITH THAT CHARGED BY HIS FAVORED COMPETITOR WHO RECEIVES THE BENEFIT OF A DISCRIMINATORY PRICE DOES NOT PRECLUDE THE DISFAVORED BUYER FROM OBTAINING RELIEF UNDER THE ROBINSON-PATMAN ACT.

The only reason FirstCom was able to forecast sales which would legitimize

ACS's granting to it "large distributor pricing" was the assumption that FirstCom, by obtaining the USAA account, would qualify for that price. Without the sales of product to USAA, FirstCom would never have qualified for any volume discounts, even by the contrived standards of ACS. Thus, by projecting that FirstCom could take the USAA account away from Americom, FirstCom could justify receiving a volume discount price. In a self-fulfilling prophecy, FirstCom could formulate its projections, knowing it would in fact acquire the USAA account because FirstCom would have the benefit of a lower price.

The USAA headsets, which provided the bulk of the sales volume of both Americom and FirstCom, were specially adapted. Neither Americom nor FirstCom could have qualified for the volume dis-

count without obtaining the USAA contract. Because ACS granted the discount price to FirstCom, largely due to its assessment of Americom's poor credit, it was foreordained that only FirstCom would qualify for the discount. The very price discrimination which is at issue in this case stacked the deck against Americom and guaranteed that FirstCom would become the only party eligible for discount. Any suggestion that ACS was neutral in deciding to award to FirstCom the low price is misleading.

That Americom accepted a lower profit margin in the resale prices of headsets does not preclude it from obtaining relief.

> [W]here the record indicates a price differential substantial enough to cut into the purchaser's profit margin and discloses a reduction which would afford the favored buyer a significant aggregate savings that, if reflected in a resale

> price cut, would have a noticeable effect on the decisions of customers in the retail market, an inference of injury may properly be indulged. It is unnecessary that there be evidence that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer customer-attracting services which will give him a substantial advantage over his competition.

Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 (5th Cir. 1965) (footnote omitted). ACS's argument to the contrary is without merit.

II. THE COST JUSTIFICATION DEFENSE CANNOT BE EMPLOYED WHEN THE PURPORTED COST SAVINGS ARE NOT RELATED DIRECTLY TO THE SALES WHICH ARE AT ISSUE.

ACS argues on the one hand that the higher price charged to Americom was not substantially higher than that charged to

FirstCom, but yet it was still justified by differences in ACS's costs. As the Court accurately observed in FTC v. Morton Salt Co., 334 U.S. 37, 48-49 (1943), there is no such thing as a small price discrimination in absolute terms. A price difference of 5% in some markets can have a greater effect than a price difference of 20% in another market. A price difference is discriminatory if it adversely affects competition.

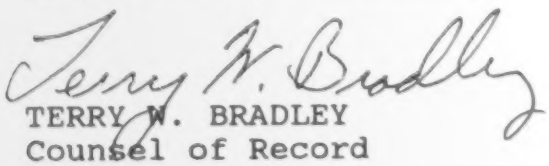
ACS had two price levels: one for large distributors and one for small distributors. Its proof tended to show only that, in the aggregate, its costs were lower in distributing goods to large quantity buyers than to small quantity buyers. The very argument strikes at the heart of the evil Robinson-Patman aims to redress in a primary line case: the ability of large quantity buyers to ob-

tain discount prices solely by virtue of their size. The fact that delivery in carload lots may have been less expensive in the aggregate for a seller of salt to distribute than non-carload lots does "not tend to disprove injury to the merchant compelled to pay the less-than-carload price." Id. at 48. ACS did not, and could not, demonstrate how these particular discriminatory prices were cost-justified. The fact that ACS preferred to sell in large quantities generally is beside the point.

CONCLUSION

Thus, and for all the foregoing reasons, the Court should grant the writ of certiorari and set the case down for briefing and argument on the issues herein presented.

Respectfully submitted,



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